58, 1936

In the Privy Council.

No. 52 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

RESPONDENT'S CASE.
The Official Guardian.

IN THE MATTER of the Estate of Katherine Hamilton Browne deceased; and
IN THE MATTER of the Construction of the Will of the said deceased.

BETWEEN

ENID BROWNE ... ... *Appellant,*

AND

FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR, HELEN SMITH, THE OFFICIAL GUARDIAN on behalf of the Infant Children of Florence Yoda Moody and Constance Emma Kinnear, and of any unborn children of the said Florence Yoda Moody and Constance Emma Kinnear as well as of Helen Smith and of Enid Browne, and WILLIAM GEORGE HAMILTON BROWNE and THOMAS CAMERON URQUHART Executors of the Estate of Katherine Hamilton Browne Deceased, and NEDRA CAROLINE SMITH ... ... *Respondents.*

CASE OF THE RESPONDENT
THE OFFICIAL GUARDIAN.

1. This is an Appeal from a judgment of the Supreme Court of Canada dated the 6th day of March, 1934, affirming a judgment of the Honourable the Chief Justice Rose of the High Court of Justice for Ontario dated 25th March, 1933. Record. p. 21. p.12.

2. The above named Testatrix Katherine Hamilton Browne died on the 17th day of March, 1930, having made a Will dated the 16th day of September, 1929. p. 5, l. 43. p. 6, l. 4.

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Record.

3. By Clauses 5, 6 and 7 of the Will the Testatrix provided as follows :—

p. 6, l. 29 *et seq.*

" 5. Whereas I have now the sum of $100,000.00 invested in the " name of E. H. Watt, of the said firm of Watt & Watt, in trust in the " form of a call loan. I hereby direct that the said fund is to be con- " tinued to be invested in call loans by the said E. H. Watt during the " lifetime of my said son, William George Hamilton Browne, and the " income arising therefrom is to be paid to my said son during his " lifetime. In the event of the death of the said E. H. Watt during the " lifetime of my said son, I direct that the fund now invested by him in " the form of a call loan shall be invested by my executors in such " securities as are authorised by the laws of the Province of Ontario as " trustee investments, and the income therefrom is to be paid to my " said son during his lifetime. On the death of my said son, William " George Hamilton Browne, I direct that the said fund of $100,000.00 " is to be divided as follows :—

" One half of the said fund to my grand-daughter Enid Browne, " daughter of my son, William George Hamilton Browne, and the " remainder of the said fund to be divided equally between my " daughters, Florence Yoda Moody, wife of Robert E. Moody now " of Los Angeles, California ; Constance Emma Kinnear, wife of " Harold Kinnear of the City of Detroit, in the State of Michigan, " and Helen Smith, wife of Herbert P. Smith, of Jamaica, Long " Island, New York, share and share alike.

" 6. All the rest and residue of my estate, both real and personal, " of whatsoever kind and wheresoever situate, I Give Devise and " Bequeath unto my grand-daughter Enid Browne, and my daughters, " Florence Yoda Moody, Constance Emma Kinnear and Helen Smith, " to be divided amongst them equally share and share alike.

" 7. In the event of my grand-daughter, Enid Browne, or any of my " said daughters predeceasing me or predeceasing my said son, leaving " issue, I direct that the child or children of the person so dying shall " take the interest to which their mother would have been entitled had " she survived."

p. 5, l. 47.

4. Probate of the said Will of the Testatrix was on the 22nd day of January, 1931, granted to the said William George Hamilton Browne and Thomas Cameron Urquhart the Executors therein named.

5. The Testatrix left her surviving her son, William George Hamilton Browne, her grand-daughter Enid Browne, and her daughters Florence Yoda Moody, Constance Emma Kinnear and Helen Smith. Florence Moody has three infant children. Constance Emma Kinnear has one infant child. Helen Smith has one child, an adult, the Respondent Nedra Caroline Smith.

p. 8, l. 9.

p. 8, l. 15.

6. On 1st September, 1932, proceedings were commenced by Originating Motion to the High Court of Justice for Ontario for the determination of the following questions, amongst others, viz.:—

p. 5, l. 29 *et seq.*

" (2) When do the respective shares of the four beneficiaries entitled " to the corpus of the . . . fund in remainder, under Paragraph 5 of the " . . . Will, become vested ?

" (3) Do their shares vest absolutely, immediately upon the death " of the Testatrix, payable on the death of the said William George " Hamilton Browne, through their having survived the Testatrix, " under the first contingency of Clause 7 of the said Will? or Record.

" (4) Are such respective shares liable to be divested through the " beneficiaries predeceasing the said William George Hamilton Browne " leaving issue, under the second contingency of Clause 7 ?"

7. The said Originating Motion came on for hearing before the Hon. Chief Justice Rose who delivered judgment on the 25th day of March, 1933, declaring that the legacies directed by the Testatrix under paragraph 5 of the Will to be paid on the death of William George Hamilton Browne did not nor did any of such legacies become vested in the legatees on the death of the Testatrix. p. 12.

8. His Lordship said " upon consideration I am unable to find anything " in the Will to distinguish the gift to the grand-daughter and the daughters " from the gifts in *Re Gilmour* 41 O.W.N. 34 and *Re Gaukel* 41 O.W.N. 214 " and 365, which were held to be covered by the rule stated in *Busch* v. *The* " *Eastern Trust Co.* (1928) S.C.R. 479." p. 10, l. 27 *et seq.*

9. In accordance with Ontario practice the Originating Motion was served upon the Official Guardian as representing the infant children of Florence Yoda Moody and Constance Emma Kinnear as well as the unborn children of Florence Yoda Moody, Constance Emma Kinnear, Helen Smith and Enid Browne.

10. On the 7th day of April, 1933, an Order was made by the Court of Appeal for Ontario granting leave to appeal per saltum direct to the Supreme Court of Canada. p. 14.

11. The Appeal was heard before the Supreme Court of Canada on the 28th and 29th days of December, 1933, when the Court (Duff C.J., Rinfret, Smith, Cannon and Hughes, JJ.) reserved their judgment. The form of the questions submitted to the Supreme Court was as follows :—

" (*a*) Whether or not the legacies directed by the said Testatrix, " Katherine Hamilton Browne, deceased, under paragraph 5 of her said " Will to be paid to Enid Browne, Florence Yoda Moody, Constance " Emma Kinnear and Helen Smith (the Appellants herein) upon the " death of the life tenant, William George Hamilton Browne, became " vested upon the death of the said Testatrix ; p. 8, l. 38 *et seq.*

" (*b*) And should this Honourable Court find that such legacies did " become vested upon the death of the Testatrix, then whether or not " the legacy of any of such Appellants is liable to be divested under or " otherwise affected by paragraph 7 of the said Will."

Record. p. 15.

12. The judgment of the Supreme Court was delivered on the 6th March, 1934, by Rinfret J. dismissing the Appeal and declaring in answer to question (*a*) above that the legacies referred to did not become vested upon the death of the Testatrix and that in view of the answer to question (*a*) the point submitted in question (*b*) did not arise.

p. 17, l. 6.

Rinfret J. said :—

" In answering the questions submitted, our endeavour must be to " give effect to the Testator's intention. And the only safe method of " determining what was the real intention of a Testator is to give the " fair and literal meaning to the actual language of the Will (*Auger* v. " *Beaudry* [1920] A.C. 1010 at 1014). If we approach from that view- " point the Will now under consideration, the first thing to be noted is " that, throughout paragraph 5, there are to be found no words of " present gift. The Testatrix states that she has now a sum of $100,000 " invested in the name of E. H. Watt, in trust, in the form of a call " loan. Her direction is that ' the said fund is to be continued to be " invested in call loans.' A feature perhaps not to be overlooked is that " this direction is not given to the executors—at least, it is not primarily " so given. The direction is that the investments are to be made ' by " the said E. H. Watt,' who is not appointed Executor. So that the " fund is really treated as separate and distinct from the estate disposed " of in the Will. And it is to be looked after in this way ' during the " lifetime of my said son, William George Hamilton Browne,' that is to " say : during the whole period extending up to the time fixed by the " Testatrix for the distribution to the Appellants. Only indirectly, ' in " ' the event of the death of the said E. H. Watt during the lifetime of " ' my said son ' are the Executors to be entrusted with the power of " investing the fund. Moreover there is nothing in paragraph 5 " necessarily indicating that, except in the event mentioned, the " Executors are to have anything whatever to do with the fund. In " terms it is not given to them either in trust or otherwise. The " Testatrix merely says that she has that sum of $100,000 invested in a " certain form in the name of E. H. Watt. The income arising there- " from is to be paid to the son. The principal itself is not given, but is " to remain in the form in which it is, until the death of the ' said son.' " Only then, when the Testatrix comes to refer to her son's death, and " for the first time in the Clause, does she make use of expressions apt to " dispose of the capital or in any way connecting the Appellants with the " fund itself. According to the words she uses, grammatically and literally, " the Testatrix gives when she divides, and there is no apparent inten- " tion that the gift should take effect at any date prior to the time she " fixes for the division.

" In contradistinction to the language of Clause 5, must we point to " the wording of every other Clause of the Will where the Testatrix " makes a bequest with the evident intention that it should become " vested at once. Invariably and in each case without exception, the " Testatrix says : ' I Give, Devise and Bequeath.' That is the expres- " sion used in Clause 6 (above set out) where she disposes of the rest and

" residue of her estate. Such is also the expression in Clauses 3 and 4 " which it is not necessary to quote in full, and which are the other " clauses of the Will containing the specific bequests.

" The contrast between Clause 5 and these other Clauses is so " striking as to lead to the logical—if not the almost inevitable— " conclusion that, while all the other bequests were intended to vest " immediately upon the death of the Testatrix, the language in Clause 5 " was purposely chosen to indicate a contrary intention. It evidences " a desire to postpone the operation of the gift to the Appellants until " the period of distribution.

" That view is further confirmed by Clause 7. The direction there " is that in the event of the grand-daughter, Enid Browne, or any of the " daughters predeceasing the Testatrix or predeceasing her son, leaving " issue, ' the child or children of the person so dying shall take the " ' interest to which their mother *would have been entitled had she* " ' *survived.*' The interest there referred to, and ' to which the mother " ' would have been entitled had she survived ' is the interest conferred " in Clause 5. In the premises, the fair and literal meaning of those " words is that the mother (*i.e.* any of the Appellants) takes no title to " that interest unless she survives both the Testatrix and her son, and " that is to say : till the time of distribution."

13. On behalf of the children of the grand-daughter and daughters of the Testatrix and of their unborn children the Official Guardian prays that in the judgment to be given their rights in the property the subject matter of this Appeal may be defined and protected and that the costs of the Official Guardian may be provided for and submits to such order therein as their Lordships may be pleased to recommend to His Majesty ; but for the protection of the said persons whom he represents as aforesaid the Official Guardian formally submits that the Judgment of the Supreme Court of Canada dated 6th March, 1934, should be affirmed for the following amongst other

REASONS

1. Because there is no gift of the capital of the fund given by Clause 5 except through the medium of a direction to divide such fund at a future period.

2. Because prima facie interests in a fund given by means of a direction to divide at a future period do not vest until that period.

3. Because the Will of the Testatrix contains no context indicating that payment of the shares and interests given by Clause 5 thereof is postponed only for the convenience of the estate or to let in a prior life interest, or other context excluding the prima facie rule applicable to gifts of this character.

4. Because the language of Clause 5 of the Will differs materially from that used in other parts of the Will by which immediate interests are given.
5. For the reasons given by Rose C.J. in the High Court of Ontario and by Rinfret J. in the Supreme Court of Canada.

14. With regard to the second question, if it shall become necessary to decide the same, the Official Guardian on behalf of the said persons whom he represents submits that if the legacies directed to be paid by Clause 5 of the Will are held to be vested they are in any event not vested absolutely or indefeasibly but that each legacy is under Clause 7 of the Will liable to be divested in favour of the children of the legatee in the event of that legatee predeceasing William George Hamilton Browne for the following amongst other

REASONS

1. Because the language of Clause 7 is amply wide enough to extend to the interests given by Clause 5 and the reference in Clause 7 to the Testatrix's son would be inappropriate unless Clause 5 were intended to be referred to.
2. Because there is no repugnancy in a Clause directing that legacies payable at a future date (even if vested in the first instance) shall nevertheless be divested in favour of some other person or persons if the legatee dies before that future date.
3. Because Clause 7 is clearly intended to apply (so far as regards the interests given by Clause 5 of the Will) to the event of a legatee predeceasing the Testatrix's son and accordingly the interest of a legatee under Clause 5 cannot become indefeasible by reason only of surviving the Testatrix.

A. W. ROEBUCK.
McGREGOR YOUNG.
G. P. SLADE.

In the Privy Council.

No. 52 of 1936.

On Appeal from the Supreme Court of Canada.

IN THE MATTER OF THE ESTATE OF KATHERINE HAMILTON BROWNE, deceased

AND

IN THE MATTER OF THE CONSTRUCTION OF THE WILL OF THE SAID DECEASED.

BETWEEN

ENID BROWNE ... ... *Appellant,*

AND

FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR, HELEN SMITH, THE OFFICIAL GUARDIAN ON BEHALF OF THE INFANT CHILDREN OF FLORENCE YODA MOODY AND CONSTANCE EMMA KINNEAR, AND OF ANY UNBORN CHILDREN OF THE SAID FLORENCE YODA MOODY AND CONSTANCE EMMA KINNEAR AS WELL AS OF HELEN SMITH AND OF ENID BROWNE, AND WILLIAM GEORGE HAMILTON BROWNE AND THOMAS CAMERON URQUHART EXECUTORS OF THE ESTATE OF KATHERINE HAMILTON BROWNE, DECEASED, AND NEDRA CAROLINE SMITH ... ... *Respondents.*

CASE OF THE RESPONDENT

THE OFFICIAL GUARDIAN.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.